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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD LEWIS,

Defendant and Appellant.

A130771

(Alameda County  
Super. Ct. No. C160946D)

In re RICHARD LEWIS,

on Habeas Corpus.

A134895

Yusuf Bey V (Fifth) and Joshua Bey (Joshua), members of Your Black Muslim Bakery in Oakland, admitted involvement with others in crimes against Jane Doe One and Jane Doe Two, including carjacking, kidnapping, and torture, on the night of May 17, 2007. Fifth and Joshua identified defendant Richard Lewis, a short-term Bakery member, as a participant in the crimes, and they were the principal prosecution witnesses against Lewis at his jury trial.

Lewis was convicted by the jury of carjacking (Pen. Code, § 215, subd. (a)) and kidnapping (Pen. Code, § 207, subd. (a)) Doe Two, and of the following offenses against Doe One: carjacking (Pen. Code, § 215, subd. (a)); kidnapping for extortion with bodily harm (Pen. Code, § 209, subd. (a)); kidnapping for robbery (Pen. Code, § 209, subd. (b)(1)); and torture (Pen. Code, § 206). The jury found true allegations that Lewis committed all of the offenses while armed with a firearm. (Pen. Code, § 12022, subd.

(a)(1).) He was sentenced to: life without the possibility of parole, plus one year for the firearm allegation, for kidnapping Doe One for extortion; a consecutive term of life, plus one year, for torturing Doe One; and a consecutive term of eight years for kidnapping Doe Two.

Lewis challenges his convictions and sentence on multiple grounds. His lead argument on appeal rests on the rule that accomplice testimony must be corroborated by other evidence connecting a defendant to the crime. (Pen. Code, § 1111.) Lewis maintains that such corroboration was, as a matter of law, lacking here. Lewis's other main argument, advanced in the appeal and related petition for habeas corpus, is that he was improperly convicted through guilt by association. He submits that his counsel was incompetent for failing to object to the admission of evidence of crimes committed by other Bakery members, and that he was prejudiced by the omission.

Although the evidence of corroboration was slight, we conclude it was sufficient to make its adequacy an issue for the jury. However, we can see no justification for counsel's failure to object to admission of the third-party other crimes evidence, which included shoplifting, resisting arrest, vandalism, hate crimes, criminal threats, false imprisonment, illegal firearm possession and use, and murder. The appellate record shows that counsel had no tactical reason not to object to introduction of this irrelevant and inflammatory evidence.

The prosecutor exploited the other crimes evidence in arguments to the jury by, among other things, calling the Bakery a "terrorist stronghold," and linking Lewis to the notorious murder of journalist Chauncey Bailey. He said that Lewis and Devaughndre Broussard, Bailey's killer, were "gangsters from San Francisco," and that "Chauncey Bailey gets killed," when "[y]ou get guys like Lewis on the scene."

The case for conviction was very close. There was no strong evidence of guilt apart from the testimony of accomplices who benefited greatly from their participation in the prosecution case. When we consider the effect of the other crimes evidence in light of the thin evidence of Lewis's guilt, we are compelled to conclude that admission of the other crimes evidence was prejudicial. We therefore reverse the judgment of conviction.

## **I. BACKGROUND**

### **A. The Kidnappings, Torture, and Rescue**

Oakland Police Officer Borjesson was alone on patrol around 11:00 p.m. on May 17, 2007, investigating a report of a stolen car. He found the stolen car parked on Church Street and went to the intersection of Church and Avenal Streets, intending to make U-turn, when he spotted what appeared to be an unmarked police car parked on Church. The car was a Crown Victoria, with a black male in the driver's seat. The man was wearing a "black beanie," "like a knit style black ski [cap]," and Borjesson could not see his features. Borjesson was concerned about interfering with a police operation in the area, and was going to drive up to the Crown Victoria, when he heard the sound of breaking glass from the house on the corner of Church and Avenal, and the sounds of fences rattling from the back of the house, as though people were fleeing through backyards.

Borjesson trained his lights on the house and saw the front window being broken out by a woman, Doe One, screaming for help. She was bleeding, handcuffed, and nude from the waist down with a bag over her head. She appeared to be seriously injured, and Borjesson thought he had happened upon a burglary. He called for an ambulance and additional officers. Doe One reported that she had been kidnapped at gunpoint by people in the Crown Victoria. Borjesson went into the house with other officers. No one was there.

Doe One testified that she was driving her Pontiac and taking her mother, Doe Two, home after playing bingo, when they were pulled over on the 580 Freeway by what she thought was a police car. She stopped on the shoulder of the road, and the other car stopped behind her. She heard the door open on her mother's side of the car, and a man wearing a mask came to the driver's side door, pointed a long rifle at her, opened the door, and pulled her out. She described the mask as a black beanie cap like a ski mask with holes for the eyes. She said that the mask looked like a black knit beanie cap that was later recovered from a Chrysler, another vehicle used in the abduction.

The man took her at gunpoint to the Crown Victoria. She got in the backseat, the man with the rifle sat next to her, and Doe Two sat on the other side of him. Doe Two had Doe One's purse, and the abductors had taken their cell phones. Doe One saw someone drive her car away from the scene. She was handcuffed by a man in the front passenger seat, and either that man or the gunman next to her put a plastic garbage bag over her head. The gunman poked a hole in the bag by her mouth so she could breathe, and told her that she would live if she cooperated.

The Crown Victoria came to a stop after a short drive. Doe One was helped to walk a short way and placed on a chair. She could not see where she was going due to the bag over her head, and her skirt slipped off as she was walking. Two people asked her where she and Tim kept their money. Doe One was a cocaine dealer and bought the drug from Tim Crawford. The men said that they had been watching her at the Rumors bar, where she bought and sold cocaine. The night before, when she left Rumors to drive home, she thought she had been followed by a dark car. When she was kidnapped on May 17, she had cocaine in her purse.

She told her kidnappers that she had no money and did not know where Tim kept his money, and she was hit on the top of her head with a very heavy object. She thought she had been shot and blood ran down her face. She was later hit with the heavy object on her leg, and again on her head. She may have lost consciousness and could not remember everything that happened to her. But she recalled being threatened when one of her abductors said he would put a hot curling iron up her vagina. She was also told that she and her mother would be dumped on a hill, which she took as a death threat. She told Officer Borjesson that she was also threatened with gasoline.

After she admitted she knew Tim and gave her abductors her address, she heard glass breaking and people running. When it sounded like no one was there, she ran to a window, broke it with her elbow, and screamed for help. When she was outside the house with the bag off her head, she saw someone jump over a fence. The person was small, like the man who pulled her out of her car.

Doe One received stitches on her head and hand. Her hand had a gash from being cut, and her blood was found on a knife recovered at the scene. Doe Two was found in the backseat of the Crown Victoria with a heavy cloth over her head. She appeared to be in shock, and was unresponsive to police questions. Doe Two was 68 years old at the time of trial, suffered from mental illness, and did not testify.

**B. The Bakery, Its Members, and Debts**

The Crown Victoria, and a Chrysler also parked near the house at the corner of Church and Avenal, belonged to Your Black Muslim Bakery (the Bakery). The Bakery was a business that sold food and provided security services, as well as a religious organization that followed and preached the teachings of the Nation of Islam. The Bakery was founded by Dr. Yusuf Bey, whose 42 children included Yusuf Bey IV (Fourth), Fifth, and Joshua. The Bakery owned several buildings in Oakland, including its storefront at 5832 San Pablo Avenue, residences across the street, and a duplex in back at 1083 59th Street. The Bakery had a military wing known as the “Fruit of Islam.” Its members wore suits and bow ties, had military titles, performed army style drills, and were expected to respond to “fruit calls” to protect the Bakery and its members.

After Dr. Bey died in 2003, leadership of the Bakery passed to Antar Bey, and when Antar was murdered in 2005, leadership passed to Fourth. Joshua and Fifth came to live at the Bakery in 2006. Lewis joined the Bakery after he was released from San Francisco County jail on May 2, 2007. Lewis and Fourth got to know each other when they were housed together in the jail in April and May of 2006. Fourth sent Lewis a letter in June 2006 saying, “I hope you staying strong up in there, because you can’t get in trouble, because it’s going to mess up the plans we got when you get out.”

The Bakery’s business deteriorated under Fourth, and in 2006 it filed for bankruptcy. Antar had borrowed \$600,000 against the Bakery’s properties, and the money had disappeared. The Bakery owed monthly payments of \$30,000 and, including unpaid taxes, the Bakery’s debt exceeded \$1 million. Fourth tried to get a loan for the Bakery, but the loan fell through.

### C. Fourth, Fifth, Joshua, and Halfin Are Picked Up on the Night of the Kidnappings

Aurelia Carrasco testified that she was celebrating her 20th birthday in Berkeley on the night of May 17, 2007, when Fifth, her ex-boyfriend, called and asked her to pick him up at a gas station at 73rd and Bancroft Avenues in Oakland to give him a ride home. The location was on her way home so she agreed. When Carrasco got to the gas station, Joshua was with Fifth, and she drove them to the Bakery. She later visited Fifth in jail and took calls from him while he was there. Fifth asked her to say that he was with her on her birthday, but she refused.

Kahlil Raheem testified that Fourth placed a “fruit call” to him around 11:30 p.m. on May 17, and said he needed to be picked up at Havenscourt Boulevard and Bancroft in Oakland, ten blocks away from the house where Doe One was tortured. Raheem had joined the Bakery in 2004, and was living at the duplex at 1083 59th Street behind the Bakery. Raheem drove from the duplex and picked up Fourth, who said they had to retrieve the Bakery’s Chrysler at Church and Avenal, and pick up Tamon Halfin, another long-time Bakery member who was also nearby. Fourth gave Raheem the keys to the Chrysler. There were a lot of police at Church and Avenal, so they picked up Halfin. They drove to Raheem’s brother’s house, which was two minutes away from the Chrysler. Fourth and Halfin took Raheem’s car and returned to the Bakery. Raheem waited and tried to retrieve the Chrysler later that night, but the police were still there. When he went out to look for the Chrysler at 8:00 a.m., the police were gone and so was the car.

Fourth told Raheem to report the Chrysler as stolen, and Raheem did so on May 18. He told the police that he drove the car to his brother’s house, parked nearby around 8:00 or 9:00 p.m. on the 17th, and it was gone when he returned to get it. He told this lie to the police because he did not want to “throw somebody under the bus.” Fourth told Joshua to make up a story about theft of the Crown Victoria. So, Joshua went to a police station and reported that the Crown Victoria had been stolen. Joshua said that he dropped the keys to the car in a parking lot when he was out to eat, and that he left his phone in the car. The Chrysler and the Crown Victoria were impounded by the police.

#### D. Evidence From the House and the Cars, and A Neighbor's Testimony

The house at the corner of Avenal and Church, 6826 Avenal, was abandoned and without electricity. A window with bars above the porch, and a rear bedroom window, were broken. There was blood on the porch, blood on a chair next to the stove, and blood on the stove. A knife, red on its tip, was on top of the kitchen counter, and a sheath was found for the knife. Police found a cell phone in a side yard. Cigarette butts were recovered, and the stove and a toilet were swabbed for DNA. The stove and kitchen counter were unsuccessfully examined for fingerprints.

Doe One's Pontiac was parked near the house along with the Crown Victoria and the Chrysler. The Pontiac was swabbed for DNA.

Examination of the Crown Victoria showed that it was a former police car, with a siren, strobe, and spotlights. Passengers could not get out of the backseat unless a release button was pressed in the front seat. Items found in the Crown Victoria included a two-way radio, a radio earpiece, a soda can, and documents pertaining to the Bakery, including a "YBMB Security and Activity Log" binder.

In the Chrysler, the police recovered a black knit beanie cap on the driver's floorboard, and more documents involving the Bakery. Among the documents were payroll records listing "Kai," the name by which Raheem knew Lewis, as a Bakery employee, and a document with identifying information for several individuals, including "Rakeem Khalil Bey"—also a name later associated with Lewis—listing his address as the 1083 59th Street duplex, his Social Security number, and his date of birth. Other documents in the Chrysler included: a binder of Black Muslim teachings, an Islamic code of conduct, books listing Bakery receipts and debts, a Treasury Department document referring to delinquent taxes, a letter to Fourth threatening to foreclose on an unpaid debt, and mail addressed to Halfin.

Alejandro Herrera was a neighbor who lived in the house behind 6826 Avenal. On the night of May 17, he heard loud male voices for about 15 minutes coming from the abandoned house. He looked out his kitchen window and saw two individuals with hoods over their heads climbing the chain-link fence between his house and 6826 Avenal.

His dog was outside in the yard. He did not see the dog, but heard it barking aggressively. Herrera took his children to the living room, and did not see if the individuals who were climbing the fence came into his yard.

E. Subsequent Developments

Lewis went to the emergency room of Alta Bates Hospital in Oakland at 1:34 a.m. on May 19 for treatment of a foot injury. He said that he injured his foot the previous night when he fell down some stairs after being frightened by a dog. His right ankle was swollen and tender, but the skin was not broken. He was diagnosed with a right ankle sprain, and given a splint and crutches.

On June 2nd, Oakland Police Officer Gysin went to the Bakery with another officer to investigate an illegally parked school bus. Fifteen to 25 Bakery members gathered in a semicircle around them, with their arms folded. Fourth drove up and he and Lewis got out of the car. Lewis stood in front of the other members, like someone of importance at the Bakery, as though he were Fourth's right hand. Gysin had a number of previous encounters with Fourth but had not seen Lewis before, and thought Lewis looked like a person on a wanted flyer the other officer showed him. Gysin requested and received Fourth's permission to talk to Lewis. Gysin needed Fourth's permission because the Bakery had a "military structure," and Fourth was the boss. Lewis told Gysin that his name was "Richard Lewis," and gave his birthday. Gysin became suspicious of Lewis because no one at the Bakery had ever given him a non-Muslim name. Lewis was hostile and denied having any identification. Gysin handcuffed Lewis, patsearched him, and found identification in his pocket with his picture and the name "Rakeem Khalil Bey." According to Raheem, the Bakery conferred the name "Bey" only on members of good character.

On June 12, Oakland Police Officer Grant, the lead investigator in the case, interviewed Raheem and Joshua about their stolen car reports. Raheem and Joshua repeated their stories. Grant knew they were lying, but did not confront them about it.

On July 17, Oakland Police Officers Snyder and Perez-Angeles responded to a report that a woman was being held captive at the Bakery. On his way to the Bakery,



Snyder devised a tactical plan that included “lethal cover” if necessary, because he had been informed that the people who ran the Bakery “are similar to possibly organized crime, and subjects were known to possess high-powered rifles, shotguns, and are often armed.” When the officers arrived, the woman was handcuffed and being held against a wall by six Bakery members. Snyder drew his gun and the men released the woman. Eight to ten other Bakery members arrived and stood shoulder-to-shoulder in two lines behind Lewis, who told them to quiet down and ordered one of them to change his dirty shirt. The officers determined that the woman was intoxicated and had created a disturbance at the Bakery. Lewis gave a statement to Perez-Angeles explaining why he placed the woman in handcuffs.

On July 26, Fourth called Grant to complain about the continued impounding of the Crown Victoria and the Chrysler. Grant testified that, sometime between July 26 and August 3, Fourth went to the police station with Lewis and renewed the complaint.

On July 29, Lewis sat in front of Fourth as a show of security as Fourth preached for a television camera. Raheem described this as sitting “on post.”

#### F. The Raid on the Bakery and Its Aftermath

Police raided the Bakery on August 3, the day after journalist Chauncey Bailey was murdered. The raid was carried out by an unprecedented number of SWAT team members from throughout the county. One of the officers involved described the raid as “probably one of the highest risk operations” in which he had ever participated. There were concerns that the Bakery “might have been fortified, meaning at the doors or windows; there might have been extra security precautions put in to keep law enforcement out; also high-powered weapons.”

Police broke down the door to an upstairs bedroom in the Bakery building and found Lewis and another individual sitting on a couch. In the bedroom, they found a loaded .22-caliber rifle, strips with cartridges attached for loading an SKS rifle, and a nine-millimeter cartridge. In a dresser drawer in a nearby closet, they found a banana clip magazine for an AK-47 rifle, Lewis’s birth certificate, Fourth’s 2006 letter to him, and a reversible mask with black and camouflage patterns and a Velcro fastener.

Joshua was arrested the day of the raid and gave a statement that day implicating himself, Fourth, Fifth, Halfin, and Lewis in the kidnappings of Doe One and Two.

Officer Grant went to Santa Rita jail the following day to obtain a saliva sample from Lewis, who was also arrested in the raid. Grant testified that he showed Lewis the search warrant for the DNA, but did not tell him the subject of his investigation. Lewis backed away and said, “no.” After overcoming Lewis’s resistance, Grant and other officers pushed Lewis against a wall, handcuffed him, and obtained the saliva sample. Lewis was released from custody the next day.

Raheem was arrested in September for the kidnappings of Doe One and Two. When he was interviewed by Grant after his arrest and confronted with cell phone records showing his whereabouts on the night of the kidnappings, he began telling the truth about his involvement.<sup>1</sup>

Lewis was arrested in October for the kidnappings. Fourth, Fifth, Joshua, and Halfin were charged along with Lewis. Joshua entered into a plea agreement. Joshua agreed to plead guilty to kidnapping and to testify truthfully against Lewis, Fourth, and Halfin in exchange for a three-year prison sentence. He understood that if he proceeded to trial he was facing a possible sentence of 25 years to life, or life without possibility of parole. The cases against Fourth and Halfin were severed, and Fifth became Lewis’s sole codefendant. Fifth entered into a plea agreement on June 19, 2009. Under the agreement, Fifth was given a ten-year prison sentence in exchange for truthful testimony against Lewis, and he was not required to testify against Fourth or Halfin. He also

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<sup>1</sup> Raheem had previously pleaded no contest in a case involving charges of vandalism, criminal threats, and hate crimes stemming from a 2005 incident in which he, Fourth, Halfin, and other Bakery members smashed up a liquor store to protest the sale of alcohol to the African-American community. At the time of the Lewis trial, he faced a potential 30-year prison sentence in that case, but had not been sentenced. In exchange for his testimony against Lewis, he hoped that his conviction in the other case would be reduced to a misdemeanor, and that he would avoid serving any jail time for it. He was granted immunity from any charges related to the crimes for which Lewis was prosecuted.

understood that he would have faced a sentence of life without possibility of parole if convicted.

#### G. DNA Evidence

DNA was also obtained from Fourth, Fifth, Joshua, Halfin, and others. The DNA was compared with DNA found on evidence obtained during the investigation to determine if the suspects could be excluded as sources. Items tested included the beanie found in the Chrysler, the soda can found in the Crown Victoria, and the knife and a cigarette butt found in the house. Lewis could not be excluded as a source of DNA on two areas of the knife, but the DNA mixtures in those areas were “degraded” and “complex.” At least three people contributed DNA to one of the areas, and at least four people contributed DNA to the other. An unidentified male was the major contributor to one of the areas. Thus, the testing did not prove that Lewis was a contributor of the DNA, only that he was one of many possible contributors. The criminalist who did the testing described the results as “not significant” and entitled to “very little weight” in identifying Lewis as a participant in the crimes.

#### H. Lewis’s Telephone Calls From Jail

Three of Lewis’s many telephone calls from jail were introduced into evidence.

A week after his arrest Lewis talked to his brother. In the conversation, Lewis said: “Hey man, it’s just—most likely I supposed to get off for a preliminary hearing. But if motherfucker babble, I will be in this motherfucker. But if he don’t babble then I’m getting out. . . . [¶] Then they talking about they got DNA, my DNA at the crime scene. Inconclusive DNA. You know what that mean? . . . [¶] That means they can’t prove that it’s mine, but they cannot not prove that it ain’t mines neither. Ain’t that some retarded shit.”

The brother then asked the following questions, and Lewis gave the following answers: “[Q.] They said it’s inconclusive? [A.] Yeah, inconclusive means that they can’t prove it’s mine but they can’t prove that it’s not mine either. . . . [Q.] How did they just pick you then? [A.] Somebody— I guess somebody gave a statement implicating me in some shit I ain’t got nothing to do with. But they did that—whoever the person did

that, they let me go after he did that the first time. Then they got this little DNA shit back. Then it's like, okay. [Q.] Well they probably going to show they . . . cards on Monday then huh? [A.] Yeah. Show everything they got. So far that's all I know. They may have more. That's the dangerous side of it. But if that's all they got, then hey, but if they got more than that, then it's like oh shit. I got another fucking sit in this mother fucker for a hell a long ass situation all over again. My dumb ass."

The same day Fifth agreed to his plea, Lewis (L.) had a conversation with his girlfriend (G.), saying: "[L.] [T]he people tell me, you know, about [Fifth]. They tell me there is something crafty going on. I don't know. I'm kind of spooked. [G.] I don't understand. [L.] You remember what my biggest fear was? That's what I'm worried about. . . . [G.] Is there anything to worry about? [L.] No . . . ."

The next day, Lewis had another conversation with his girlfriend, who told him that she had called his lawyer, learned that Fifth had pleaded no contest, and that Lewis would be going to trial as a sole defendant. Lewis responded, "Mother fuck. Yeah man." His girlfriend said, "It's bad. You really need to do something." Lewis said, "I mean I ain't worried about it. Still I mean, even if— you feel me—he did it, don't mean it's all bad, just extra shit man."

## I. Accomplice Testimony

### (1) Joshua's Statements About the Kidnappings

#### (a) Trial Testimony

Joshua testified at trial that Fourth spoke about using the Crown Victoria to stop and rob drug dealers. Fourth got information about Doe One's supplier, Tim Crawford, from another drug dealer named Johnny Antone. On May 16, Fourth told Joshua to go to a bar on Seminary Avenue and look for a Mercedes and man in a white shirt and hat. Fourth instructed Joshua to call when they saw the man, because they were going to rob him. Fourth later learned that the man they were looking for was Crawford. Joshua drove the Chrysler to the bar with Halfin, found the Mercedes, watched it for several hours, and saw a light-skinned woman get inside. He reported this to Fourth, and Fourth

told him to return to the Bakery. Joshua thought they had staked out the wrong car, so they did not follow the woman when she drove away.

On the night of May 17, Fourth instructed Joshua to go to a bingo parlor and watch a gold Pontiac. Fourth told him they were going to rob someone of \$30,000. Joshua drove the Chrysler with Halfin to the parking lot of the bingo parlor. Fourth said that Antone would be there. Antone got into the Chrysler, pointed to the Pontiac, and said they could rob a woman who would be driving it after she made stops to get money. When Joshua related Antone's information, Fourth told him to follow the woman and said that he would be following as well. Halfin agreed to drive the Chrysler because Joshua did not know how to follow someone without being detected. Joshua got into the back seat and did not see an SKS rifle in the car.

Two women left the bingo parlor and drove away in the Pontiac. Halfin followed the Pontiac onto the freeway, while Joshua relayed their location to Fourth. The Crown Victoria passed the Chrysler and got behind the Pontiac with its lights flashing. The Pontiac, the Crown Victoria behind it, and the Chrysler behind the Crown Victoria, pulled over and stopped on the shoulder of the road. Fifth and Lewis, wearing masks and hoods, got out of the Crown Victoria. Their masks were like the one found in Lewis's room during the raid on the Bakery. Fifth put the driver of the Pontiac in the backseat of the Crown Victoria. Lewis went to the Chrysler, pulled the backseat forward, got an SKS rifle from the trunk, ran to the Pontiac, and put the passenger from the Pontiac in the backseat of the Crown Victoria.

Joshua never stated that Lewis retrieved a rifle from the Chrysler until after Fifth entered into his plea agreement. Joshua first mentioned this detail on July 22, 2009, during one of his 15 or more conversations with the prosecutor. He did not tell Officer Grant about the gun in the Chrysler because he thought the disclosure would make him appear to be more involved in the kidnappings.

Joshua testified that Fourth came to the Chrysler and told him to drive the Pontiac. They drove the three cars to a house. Joshua got out of the Pontiac and went to the Chrysler; Halfin got out of the Chrysler and went to the Crown Victoria. Joshua saw

Fifth, Lewis, and a woman go into the house, where Fourth was waiting inside. Ten to 20 minutes later, Fourth came out of the house and asked Joshua for the keys to the Pontiac.

Joshua went inside with Fourth and saw the woman, seated and “sniffing,” with Fifth and Lewis standing beside her, still wearing their masks. Joshua saw the sheath for a knife he thought belonged to Fourth on a windowsill. He had seen the knife in the Crown Victoria and in Fourth’s room, but did not see it in the house. The woman was saying to call someone on a cell phone about money. Fifth gave Joshua a revolver and told him to watch the woman while the others went to check out her house. Just then, they saw the brake lights of a police car outside at a stop sign.

When the car started backing up the perpetrators panicked and ran toward the back of the house. They went into the backyard through a door, and a window broken open by Lewis, and jumped a fence into the next yard. Joshua lost his cell phone before jumping the fence, but held on to the revolver. They ran through the neighbor’s backyard past a loudly barking pit bull, and, as Joshua hopped the next fence, he heard Lewis “screaming,” but “not really loud; just like ‘Ah.’ ” Joshua fled with Fifth and Lewis through “a lot” of backyards, and Fifth hid the revolver in one of them. Joshua and Fifth eventually split up with Lewis when Fifth said he wanted to go to a main street and make a phone call. Fifth called his girlfriend from a gas station and she picked them up and drove them to the Bakery.

At the Bakery, Fourth asked Joshua to pick Lewis up, and Joshua drove with Halfin in Raheem’s car to the location where Fourth said Lewis was waiting. They picked Lewis up in a residential neighborhood at a house Joshua did not recognize. Lewis was limping, and said he had hurt his ankle falling off a gate when he was bitten by a dog. They drove to another house Joshua did not recognize, where Halfin retrieved the assault rifle Joshua had seen earlier that night. They went back to the house on Avenal to retrieve Joshua’s cell phone, but the police were still there so they returned to the Bakery.

(b) August 3 Statement and Preliminary Hearing Testimony

In the taped portion of his statement to Officer Grant and another officer after his arrest on the day the Bakery was raided, Joshua gave an account of the events of May 17 that was generally consistent with his trial testimony.

He described being in the Chrysler with Halfin, following the women in the Pontiac, seeing Fourth pull the Pontiac over, and watching Fifth and Lewis get out of the Crown Victoria and put the Pontiac's passengers into the Crown Victoria. Someone had told Fourth that the women were carrying money. The three cars drove to an unfamiliar house, and Fourth, Fifth, and Lewis took one of the women inside. Halfin waited outside in the Crown Victoria with the other woman, and Joshua waited in the Chrysler, until Fourth came out of the house and told him to watch the woman inside while the others went to her house. He went into the house and saw the woman sitting on a chair with a plastic bag over her head. He saw a police car, ran to the back of the house, and went outside through a broken-out window. He followed Fifth, jumped fences, and lost his cell phone. They went to a gas station where Fifth called his girlfriend, who picked them up and took them home.

Joshua told the officers that he was too far away to see whether Fifth and Lewis had guns when they took the women out of the Pontiac. He said that he saw a black knife he did not recognize on a windowsill in the house. He did not mention that he was given a gun.

Joshua testified at trial that he decided to become a witness during the preliminary hearing because he did not want to serve a life sentence for something he did not plan. But because he wanted to help Fourth, Fifth, and Lewis, he did not disclose everything he knew at the preliminary hearing. When he was talking with Fourth after their arrests, Fourth said to blame the kidnappings on Antone and say they were collecting a debt for him. Joshua admitted that he lied in the preliminary hearing when he said that the kidnappings were done to collect Antone's debt and that the Bakery would only receive a percentage of what was collected.

Joshua was impeached with other parts of his preliminary hearing testimony. At that hearing, he admitted seeing a gun in the house on Avenal, but denied leaving the house with it. He also claimed to be uncertain whether Fifth and Lewis were the ones who got out of the Crown Victoria and abducted the women in the Pontiac. He was asked: “[Q.] Was there anything else that you told Grant when you spoke to him on August 3rd about this event, anything else that you told him that you later on realized wasn’t true? [A.] That I seen Fifth and Rich get out of the car.” At another point, he was asked: “[Q.] The two people that got out of the car, as I understand your testimony previously, you later learned those two people were Yusuf Bey, V and Richard Lewis; isn’t that correct? [A.] I don’t know if it was them for sure. I never seen the face. [Q.] Didn’t you run out of a window with these same people later on? [A.] Yeah. [Q.] Okay. And you saw them without a mask on, right? [A.] Um, everybody kind of went their own way. When I was on the street, that’s when I seen Fifth and Richard. [Q.] And they didn’t have masks on, did they? [A.] No. [¶] . . . [¶] [Q.] Were they wearing the same clothes as the two people that got out of the car? [A.] Um, no.”

## (2) Fifth’s Testimony About the Kidnappings

Fifth testified that, before the night of May 17, he and Fourth waited in the Crown Victoria by a bar near Seminary for Crawford, a drug dealer identified by Antone, who would be wearing all white. Fourth and Fifth were not wearing masks or carrying weapons. They were only going to follow Crawford that night, but they were planning to later rob him of \$500,000.

On the night of May 17, Fourth drove Fifth and Lewis to the bingo parlor in the Crown Victoria. Joshua was in the bingo parlor parking lot watching the Pontiac. Fifth thought they were going there to rob Crawford. They had a one-foot long chrome revolver in the front console of the car, which Fourth said they would be using that night. Joshua called and said two people were getting into the Pontiac. The Crown Victoria followed the Chrysler and the Pontiac, pulled the Pontiac over, and stopped a couple of feet behind it. Fifth put on a mask, and Lewis tied a bandana around his face. The



bandana had a pattern that might have been a Raiders logo. Lewis was not wearing a mask like the one found in his room when police raided the Bakery.

Fifth took the revolver, opened the driver's door of the Pontiac, and released Doe One's seat belt. He thought that Doe One got out of the car by herself, but he may have grabbed her arm.<sup>2</sup> The car was in drive and rolling, so he got in and put the car in park. Lewis was standing in front of the Crown Victoria holding a rifle at his waist, pointing it at the Pontiac. The rifle had an ammunition clip like those used in an AK or SKS. Lewis told Doe One to come to him, she obeyed, and they got into the backseat of the Crown Victoria. Fifth went to the passenger side of the Pontiac, opened the door, and Doe Two asked him not to leave her. Doe Two also got out of the Pontiac and into the backseat of the Crown Victoria. Fifth got into the front passenger seat of the Crown Victoria, while Lewis sat with the rifle in the backseat between Does One and Two. Fourth took a purse out of the Pontiac, and told Joshua to drive that car. Lewis put a garbage bag over Doe One's head, and a jacket over Doe Two's head. Doe One was handcuffed, but Fifth did not see how that happened.

They drove to a house in a residential area, and Fourth told Fifth to take Doe One inside. Fifth led Doe One, still handcuffed and wearing the bag over her head, into the house, where they were joined by Fourth and Lewis. They put her on a chair in the kitchen, Fourth asked her if she knew Tim, and she said, "No." After about five or ten minutes, Fourth told Fifth to get Doe One's phone. Fifth went to the Crown Victoria, where Halfin was waiting with the rifle Lewis had been holding and Doe Two was sitting in the backseat, and he found two phones inside Doe One's purse. Inside the purse he also found a smaller purse full of white rocks, and a pouch with marijuana. Finding the drugs made Fifth angry. He testified that he would not have participated in the crimes if he had known they were going to rob a woman, but that he no longer felt sorry for Doe

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<sup>2</sup> Doe One testified that she is five-feet, five-inches tall, and that the man who pulled her out of the car was shorter than her. Fifth is six-feet, one-inch tall, and Lewis is five-feet, eight-inches.

One when he saw that she was a drug dealer. Fifth saw Joshua outside, stealing DVDs from the trunk of the Pontiac.

Fifth took the phones to Fourth and Fourth found Crawford's phone number. Because Doe One kept lying, Fifth hit her once on the head with the handle of the revolver, knocking her out for a minute. When Lewis threatened to put a hot curling iron up her vagina, Doe One admitted knowing Crawford. She said she had \$30,000 at her house, and Fourth decided they should go there. Fourth went outside and brought Joshua into the house to watch Doe One while they went to her home. Joshua brought a sheathed knife into the house, put the knife on a counter, and put the case on a windowsill. Fifth did not see anyone use the knife on Doe One. Fifth gave Joshua the revolver, and Fourth, who was looking out the window, started running.

Fifth saw a police car and ran outside through a back door. Fourth, Joshua, and Lewis were jumping the fence outside, but Fifth hesitated when he saw a pit bull and another dog on the other side. The pit bull bit Lewis and pulled him off the fence. Lewis fell to the ground. Fifth jumped the fence while the pit bull was biting Lewis. Fifth, Joshua, and Lewis jumped more fences and ran through many backyards. Fifth took the revolver from Joshua and hid it in one of the yards. They went out to a street, saw police cars, and jumped more fences. Fifth, Joshua, and Lewis went out again to a street, Lewis turned when a police car drove by, and Fifth lost sight of him. Fifth and Joshua went to a pay phone where Fifth called Carrasco, and she gave them a ride to the Bakery.

### (3) Other Subjects

Joshua and Fifth testified about more than the kidnappings, including some of the background about the Bakery and its financial problems. Joshua said that Lewis baked and did security for the Bakery, and appeared to be close to Fourth. In the last few months before the Bakery was raided, security for the Bakery's property was handled by Lewis, Devaughndre Broussard, and Antoine Mackey. Lewis went to Sacramento after he was released from jail in San Francisco, and Fifth recounted how Fourth went there to get him with an entourage of four vehicles flying star-and-crescent flags. Fifth said that Fourth spent more time with Lewis than anyone else, and that Lewis "just kind of [rode]

around with Fourth all the time.” Fifth said that Fourth “did that with everybody at first.” Fourth knew that he was “not going to pay them so he try to make them feel special, you know, you’re my buddy; to get him comfortable.” Fourth was not being entirely honest, and Lewis “seemed to fall for it.”

Joshua testified that handguns and assault rifles were kept “[a]ll over” the Bakery for security and protection. Joshua and Fifth said the rifles included AKs, an SKS, an AR-15, and possibly an M16. Fifth said that the Bakery also had shotguns, and that its handguns included semiautomatic pistols. Fifth said he probably fired all of the Bakery’s guns, including shots from the roof of the Bakery on New Year’s and the 4th of July. He said that “all kind[s]” of guns were fired off the roof, and Joshua said he had seen lots of expended casings on the roof.

Fifth went to jail in June 2007 to serve a sentence for felony possession of a TEC-9 assault handgun. He was arrested for the offense at a Walgreens in January 2007, where Fourth was shoplifting.

#### J. Other Crimes Evidence

In addition to learning that Fourth had shoplifted and Fifth had unlawfully carried an assault weapon, the jury heard that Bakery members including Fourth, Halfin, and Raheem had vandalized a liquor store, and that Raheem had been convicted of hate crimes and criminal threats in connection with that case. The jury also learned of other crimes committed, or allegedly committed, by Bakery members.

The most detailed testimony came from Officer Gysin, who testified to encounters between the Bakery and the police before the May 17 kidnappings. Gysin said that he responded to calls involving the Bakery “quite a bit,” and had multiple contacts with Fourth. In one instance, for example, he heard shots behind the Bakery building and saw Fourth across the street laughing. Gysin said that the Oakland Police Department’s practice was to have a cover unit for officer safety anytime an officer was dispatched to the Bakery.

Gysin first went to the Bakery in response to a complaint about barking dogs. He went through a gate into a parking lot behind the Bakery building and was surrounded by

ten Bakery members who called him “the white devil” and told him to leave. He had previously heard about members attacking officers, felt threatened, and backed toward the gate. When he closed the gate, Fourth came on the scene, and he asked Fourth for documentation for the dogs. Fourth refused and also called him “the white devil.” Fourth said that he owned the dogs, and Gysin obtained Fourth’s identification, intending to cite him for failing to register the dogs. Gysin checked the identification with dispatch, and was informed that there were warrants for Fourth’s arrest. When Gysin returned to the gate, ten to 15 Bakery members had formed a wall blocking it and Fourth was gone. Fifth told Gysin that Fourth was not coming out. Gysin had two other officers with him, and they did not attempt to take Fourth into custody because they were outnumbered.

In another incident, Gysin and at least ten other officers went to the Bakery in response to a report involving a restraining order and a man in the Bakery holding a woman there against her will. The officers approached the Bakery after assembling at a staging area a number of blocks away. As they approached, two Bakery members chained and blocked the front door to the Bakery’s public store at 5832 San Pablo, and 15 to 25 other members arrived and lined up shoulder-to-shoulder in front of the door. The officers were told that the person responsible for the false imprisonment would be taken to the staging area, but after the officers returned there they were informed that the suspect would not be released.

In Joshua’s direct examination, the prosecutor brought out that, during their many meetings about the case, they had discussed crimes other than those charged against Lewis: “Q. Have I brought up with you other crimes, asked you question[s] about what you know about other criminal activity? A. Yes. Q. Have I asked you questions about the Chauncey Bailey murder? A. Yes. Q. About a couple of other murders as well? A. Yes. Q. About shooting up Cameron’s car? A. Yes. Q. Have there been times, Joshua, when I’ve told you that I didn’t think you were being completely honest with me? A. Yes.”

Details about the shooting of the car were elicited in Fifth's direct examination. In December 2006, Fifth and others shot up Cameron Cook's car with guns that included an SKS rifle and a shotgun. They did so on Fourth's orders because Cook had shot at the Bakery. Fifth stopped shooting when the others ran out of ammunition. No one was in the car, but they did not check whether the car was occupied before the shooting.

In other questioning, the prosecution elicited evidence of the Bakery's suspected involvement in the murders of Bailey and others. Raheem testified that, after the Bakery raid, he heard that Fourth had ordered Bailey's killing because Fourth did not like what Bailey intended to write. By the time he was arrested in this case, Raheem had heard in the news that Broussard admitted he killed Bailey. Raheem thought that Broussard "got the short end of the stick" because of reports that Fourth had "ordered him to take the fall for it." Joshua testified that, when he and Fourth spoke by phone in jail after the preliminary hearing, he knew that Fourth and Mackey had been indicted for three murders. Grant testified that police were investigating three homicides, as well as the kidnappings in this case, when they raided the Bakery.

#### K. Defense Case

Lewis was the sole defense witness. He testified that he was not involved in the crimes, and was probably at the Bakery on the night they occurred.

Lewis testified that he spent four or five days with his brother in San Francisco, and two or three days with his father in Sacramento, after being released from jail on May 2, 2007, so that he was only involved with the Bakery for about a week before the kidnappings. When Fourth came with four or five black sedans to pick him up in Sacramento, his impression was that Fourth "thought he was the president."

Lewis said that at 6:00 a.m. on the day before he went to the hospital for treatment of his ankle, he was asked to get the keys to a bus at the Bakery. Joshua had testified that dogs at the Bakery could escape from their kennels, and Lewis said he was frightened by a dog barking in the bus. He hurt his ankle running off the bus. He told the doctor that he fell off a bus, not a set of stairs.

Lewis said that Fifth gave him the fake driver's license Officer Gysin found on June 2 with the name "Rakeem Khalil Bey" because he needed identification to get into an adults-only club.

Lewis did not handcuff the woman who was creating a disturbance at the Bakery on July 17. The officer who took his statement to the contrary was mistaken.

He did not possess the rifle and ammunition in his room when the Bakery was raided. The police planted the rifle and ammunition there.

The warrant in evidence for obtaining his DNA listed the names "Richard Lewis" and "Rakeem Khalil Bey," but Lewis said that the warrant Grant showed him had only his false Muslim name, so he resisted giving the saliva sample.

In his October 2007 telephone conversation after his arrest, he was referring to Joshua when he said, "if motherfucker babble, I will be in this motherfucker." He acknowledged saying, "They may have more. That's the dangerous side of it. . . . [I]f they got more . . . then it's like oh shit. I got another fucking sit in this mother fucker for a hell a long ass situation all over again. My dumb ass." He said that because "I been in the judicial system before, and I know that when they pile up stuff like all these different statements from one individual to inconclusive DNA that doesn't hold no weight, you could be sitting in jail for a long time." "My dumb ass" referred to police harassment in jail, not the charges against him.

Lewis was cross-examined about his relationship with Broussard. He said that Broussard was his cousin, and they were incarcerated together for a short time after Fourth was released from San Francisco County jail. Lewis told Broussard about the Bakery because Broussard was tired of selling drugs, and Fourth was offering jobs. After Broussard was released from jail, Lewis sent him to the Bakery because he "thought maybe he could go somewhere in a positive atmosphere."

#### L. Jury Arguments

The prosecution made a lengthy opening statement, focused primarily on the events of May 17. Before turning to the circumstances of the crimes, the prosecutor said, "Now this case is not about the bakery. This case is not about religion, this case is not

about a belief system. [¶] This case fundamentally is about crime. Criminality. What people do when they're desperate for money . . . ." The prosecutor said Officer Gysin would testify to a June 2 incident when he found Lewis in possession of a driver's license with the name "Rakeem Khalil Bey." Gysin would also testify to other "less than friendly contacts" with Bakery members, and the police policy of "avoid[ing] confrontation" with Bakery members "for officer safety reasons." The prosecutor said that the Bakery was raided the day after Chauncey Bailey was killed, and that the police were investigating a couple of murders as well as this case. He described the raid as "analogous to . . . the U.S. military storming some terrorist stronghold."

In his opening statement, defense counsel argued that no evidence tied Lewis to the crimes apart from dubious accomplice testimony, and that the other evidence merely linked Lewis with the Bakery. He called the prosecution case a "vigorous attempt to paint Mr. Lewis with the brush of guilt by association. . . . That's why you heard all this stuff about the [Bakery], and I don't contest that. Won't dispute for a moment."

The prosecutor began his closing arguments by saying that the case was not about religion, or, "[f]undamentally . . . even really a case about Your Black Muslim Bakery . . ." The "scenario . . . that played out in this case could have played out in any group, whether religious or otherwise. This case is about a quest of one man to gain power and control, whatever the cost. . . . [T]his case is about a man, Richard Lewis, willing to do anything to prove himself worthy of a criminal organization that he was too blind to see was already in the process of dying."

The prosecutor said that the "only real question" was whether Lewis was a participant in the crimes, and argued that the jury should accept Fifth's version of the events. Fifth's testimony was believable for a number of reasons, including his displeasure at having to answer questions about the shooting of Cook's car. Fifth "did not want to discuss a previous event wherein his brother had ordered him to carry out a shooting along with some other folks for the purposes of revenge," but he answered questions about it because he knew that his plea agreement required truthful testimony in the case.

The prosecutor argued, consistent with Fifth's testimony, that Fifth came to Doe One's car door, even though he was not a short man like the one she described. Lewis was the short man Doe One saw, pointing a rifle at her and calling her over to the Crown Victoria, and she became "fixated on that image." Lewis was the one who handcuffed Doe One, even though she said that she was handcuffed by the man in the front passenger seat of the Crown Victoria (Fifth), rather than the man with her in the backseat (Lewis). The multiple blows Doe One received were applied by Fourth or Lewis, "more likely just Lewis," while Fifth was outside the house getting her phones.

When the argument turned to corroboration of the accomplice testimony, the prosecutor said, "Let's talk about the corroboration in this case that exists independent of the testimony of . . . Joshua and Fifth. [¶] Crime is perpetrated by members of Your Black Muslim Bakery. . . ." The prosecutor argued that corroboration included Lewis's sitting before Fourth as security when Fourth preached on July 29. He added: "July 29th, important day, four days later, Chauncey Bailey got blown away. Five days later the bakery got raided."

The prosecutor concluded his initial closing argument by calling Lewis, Broussard, and Mackey "new elements in the bakery that Fourth sought and that he obtained. Genuine, 100 percent authentic gangsters, tough guys, prepared to do anything without question." Joshua had testified that Mackey, like Lewis and Broussard, was from San Francisco. The prosecutor said that the Bakery was "torn down by gangsters from San Francisco." "You get guys like Lewis on the scene and within a very short period of time everything is destroyed. Chauncey Bailey gets killed August 2nd. August 3rd the place is raided in connection to that case, and three murders; and it all ends."

At the outset of his closing argument, defense counsel responded that although the prosecutor claimed the case was not about the Bakery, "he's spent a major portion of the time . . . talking about Your Black Muslim Bakery, talking about how Richard Lewis in his version somehow seems to have been a major player there and that that somehow connects Richard Lewis to a particular series of events which occurred on the 17th of May of the year 2007. [¶] As I told you in my opening remarks . . . at the beginning of



the trial, much of this case is nothing more than an intent to paint Richard Lewis with the brush of guilt by association. [¶] [The prosecutor] just told you . . . you can only consider evidence presented in this courtroom. You've heard no evidence about three murders. You've heard no evidence about what did or didn't happen to Mr. Chauncey Bailey. There's no allegation anywhere that Mr. Lewis had anything to do with those ideas. And yet they're brought in here."

Defense counsel continued: "And what is the purpose of that? The purpose of that is to put somehow in the back of your minds the idea that there's a horrible mess out there and that you have to make a statement to do something about it. But I . . . know that you are very intelligent people, and I know that you know how to understand the law and how you will understand the judge's instructions and that you will limit your consideration to the facts in this case, to the evidence that was presented here in this courtroom."

Counsel proceeded to highlight inconsistencies in the prosecution witnesses' testimony, and argue that Joshua and Fifth were lying to "sav[e] their own skins."

#### M. Jury Deliberations

Evidence and arguments were presented over the course of 16 court days, and the jury deliberated a little over two days before rendering its verdicts.

## **II. DISCUSSION**

### A. Corroboration of Accomplice Testimony

Lewis contends that Joshua and Fifth's testimony should not have been admitted because it was uncorroborated. (Pen. Code, § 1111 [a conviction cannot be based upon the testimony of an accomplice unless the testimony is "corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense"].) After the People rested, Lewis unsuccessfully moved for acquittal (Pen. Code, § 1118.1) based on this claimed lack of corroboration.

"The corroborating evidence may be slight and entitled to little consideration when standing alone. However, it must tend to implicate the defendant by relating to an act that is an element of the crime. It need not by itself establish every element, but must,

without aid from the accomplice's testimony, tend to connect the defendant with the offense." (*People v. Nelson* (2011) 51 Cal.4th 198, 218.) The jury was instructed consistent with these principles pursuant to CALCRIM No. 335.<sup>3</sup>

The sufficiency of corroboration of accomplice testimony is generally an issue of fact. "The trier of fact's determination on the issue of corroboration is binding on review unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime." (*People v. Nelson, supra*, 51 Cal.4th at p. 218.) "It is not the duty of the reviewing court in accomplice cases to weigh the corroborative evidence to determine whether it meets the requirements of the statute. An appellate court does not determine 'whether the corroborating evidence, by itself, is as compatible with innocence as it is with guilt. That is a question for the trier of fact. All that the appellate court does is to determine whether there is any substantial corroborative evidence, and whether, when error is found, the error committed

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<sup>3</sup> "If the crimes charged were committed, then Joshua Bey and Yusuf Bey, V were accomplices to those crimes. You may not convict the defendant of any or all of the charged crimes based upon the statement or testimony of an accomplice alone. You may use the statement or testimony of an accomplice to convict the defendant only if:

"1. The accomplice's statement or testimony is supported by other evidence that you believe;

"2. The supporting evidence is independent of the accomplice's statement or testimony;

"And

"3. That supporting evidence tends to connect the defendant to the commission of the crimes.

"Supporting evidence, however, may be slight. It does not need to be enough by itself to prove that the defendant is guilty of the charged crime, and it does not need to support every fact about which the witness testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

"The evidence needed to support the statement or testimony of any witness cannot be provided by the statement or testimony of another accomplice.

"Any statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that statement or testimony the weight you think it deserves after examining it with care and caution and in light of all the evidence."

has led to the verdict reached.’ [Citations.]” (3 Witkin, Cal. Evidence (5th ed. 2012) Presentation at Trial, § 116, p. 178 (Witkin).) “The great majority of the cases find the corroboration adequate” (*id.*, § 117, p. 178), and Lewis’s case is not one of the rare exceptions.

However, the issue here is relatively close. Most of the evidence the People identify does not qualify as corroboration. Lewis sought treatment for an ankle injury shortly after the crimes were committed, but that evidence had no probative value apart from Joshua’s and Fifth’s testimony because they were the only ones who testified to the dog attack that would connect the injury to the crimes. Tests did not exclude Lewis as a possible source among others of DNA on a knife at the scene, but the prosecution’s expert admitted that the results were too general to show that Lewis was involved in the crimes. Bakery members’ access to assault rifles and ammunition is cited as giving Lewis an opportunity to commit the crimes, but Joshua and Fifth were the only ones who testified to the type of gun Lewis allegedly used. Lewis had access to handcuffs at the Bakery, and used them after the crimes were committed to handcuff a woman who was creating a disturbance, but neither of those facts had any significant probative value as accomplice corroboration or evidence of guilt.

The People note that Lewis lied about having identification during the June 2nd investigation of the illegally parked school bus. (*In re B.D.* (2007) 156 Cal.App.4th 975, 985 [“ ‘[f]alse or misleading statements to authorities may constitute corroborating evidence’ ”].) But the most plausible reason for the lie is that he was carrying a fake driver’s license. Since he did not try to hide his identity and gave the officer his correct name, as well as his date of birth, there is no reason to believe that he lied about the identification to cover up involvement in the charged crimes. Documents listing the names “Kai” and “Rakeem Khalil Bey,” the name on the fake driver’s license, were found in the Chrysler involved in the crimes, but given all of the other property associated with the Bakery in the car, those documents merely showed that Lewis was a Bakery member.

The People contend that Bakery membership alone tied Lewis to the charged offenses because of the evidence that Bakery members committed crimes. However, “ ‘it is insufficient corroboration merely to connect a defendant with the accomplice or other persons participating in the crime[.] . . . [E]vidence independent of the testimony of the accomplice must tend to connect a defendant with the crime itself, and not simply with its perpetrators.’ ” (*People v. Robinson* (1964) 61 Cal.2d 373, 400.) Lewis’s Bakery membership by itself served as corroboration only in the limited sense, discussed below, that it gave him a motive for participating in the charged crimes.

Nevertheless, there is other evidence connecting Lewis to the crimes, independent of Joshua’s and Fifth’s testimony, that was at least arguably sufficient to satisfy the slight corroboration requirement. That evidence consists primarily of statements Lewis made on the phone while in jail, and property found in his possession when the Bakery was raided. It also includes evidence suggesting his consciousness of guilt and his motive.

When Lewis was talking to his brother a week after he was arrested about the case against him, he mentioned Joshua’s statements implicating him in the crimes and the prosecution’s DNA evidence, adding: “*They may have more. That’s the dangerous side of it. But if that’s all they got, then hey, but if they got more than that, then it’s like oh shit. I got another fucking sit in this mother fucker for a hella long ass situation all over again. My dumb ass.*” The jury could reasonably find that the italicized statements tended to implicate Lewis in the crimes. The prosecutor argued that Lewis’s worrying about the danger of additional evidence was in effect an admission of guilt because “[t]hey can’t have more unless there is more.” (*People v. Williams* (1997) 16 Cal.4th 635, 680 “[t]he necessary corroborative evidence for accomplice testimony can be a defendant’s own admissions”]; *People v. Davis* (2005) 36 Cal.4th 510, 543 [accomplice testimony sufficiently corroborated solely by defendant’s statements and adoptive admissions in jailhouse tape recording].) The prosecutor argued that Lewis was confessing when he said “My dumb ass” because he was “accepting responsibility for the situation within which he finds himself.”

The jury admittedly could have rejected these arguments and found that the statements we consider significant were not incriminating. The statements were made during a conversation in which Lewis said he was being accused of something he had “nothing to do with.” Talk of the “danger[]” of additional evidence might have referred to false evidence and time in custody for crimes Lewis did not commit. Lewis might have felt like a “dumb ass” for joining the Bakery, not for committing the crimes. But it is not our task, in reviewing the jury’s factual finding on corroboration, to weigh whether the telephone conversation was “as compatible with innocence as . . . with guilt.” (Witkin, *supra*, § 116, p. 178.) We presume that the jury drew every inference permitted by the evidence in support of the finding of corroboration and determined that Lewis’s statements were incriminating, as the prosecutor argued.

More corroboration of Lewis’s involvement in the crimes was supplied by the rifle and black mask found in his room when the Bakery was raided. This evidence had probative value apart from Joshua and Fifth’s testimony because Doe One testified that she was abducted by a man in a black mask with a large gun.

Additional corroboration was supplied by the evidence that Lewis resisted providing a DNA sample to the police following his October 17 arrest. (*People v. Williams* (2013) 56 Cal.4th 630, 679 [behavior “support[ing] an inference of consciousness of guilt . . . constitutes an implied admission, which may properly be considered as corroborative of the accomplice testimony”]; *People v. Avila* (2006) 38 Cal.4th 491, 563.) Lewis maintains that his resistance was not probative of guilt because Officer Grant did not disclose the offenses he was investigating when he obtained the saliva sample. However, Lewis’s own testimony revealed that he may have known he was suspected of the kidnappings. Lewis admitted that, when his DNA was collected, he knew that Joshua had been arrested for kidnapping and had been told that Joshua “said I [Lewis] did everything.”<sup>4</sup> Although Lewis immediately equivocated about knowing the

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<sup>4</sup> “Q. But by the time you were arrested, you knew that Fourth and Joshua and Tamon had been charged with kidnapping, right? A. At which time, which arrest? Q. When you were arrested in October. A. The first time or second time? Q. Second time. A.

reason for Joshua’s arrest, he could be found from these admissions to have known that his DNA was being sought in connection with the kidnappings.

Further corroboration was provided by evidence of Lewis’s association with the Bakery as it tended to show that he had a motive to participate in the crimes. (See *People v. Szeto* (1981) 29 Cal.3d 20, 28 [accomplice corroborated by evidence, including gang membership, of defendant’s motive and opportunity]; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1178 [same]; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1022 [same].) Evidence aside from Joshua and Fifth’s testimony was elicited that the Bakery had financial problems, Lewis was a prized recruit, Lewis was close to Fourth, and Lewis rapidly assumed a prominent role at the Bakery—all of which suggested that he would have been motivated to help Fourth obtain the money the Bakery needed. The same, of course, could be said for other loyal Bakery members.

Taken together, the foregoing evidence, while relatively thin, was potentially sufficient to satisfy the slight corroboration standard. Whether the accomplices were adequately corroborated was properly submitted to the jury to resolve.

#### B. Other Crimes Evidence

Lewis contends that his counsel was incompetent for failing to effectively object to introduction of the evidence of crimes committed by other Bakery members.

##### (1) Additional Background

Lewis filed a motion in limine at the outset of trial to exclude evidence that he had been prosecuted in San Francisco for murder, and arrested for possessing the fake “Rakeem Khalil Bey” driver’s license, arguing that the evidence of the events was more prejudicial than probative under Evidence Code section 352 (hereafter § 352). The

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Yes, I was; I think I was aware of it. I’m not sure. I know they were still in jail on a lot of charges, but I don’t know if I was—what particular charge. Q. When did you first become aware that Joshua was arrested and said you were with them the night of the kidnapping and that you participated in it; when did you first learn that? A. The night at the bakery raid, they had us in the bullpen and the detectives came in there and told us they had a—first they said that Joshua said I did everything and this, that, and the third, and asked me if I had anything to say about it.”

prosecution opposed, arguing that Lewis's incarceration in San Francisco County Jail was relevant to connect Lewis with Fourth, and that the driver's license was relevant to connect Lewis with the Chrysler used in the kidnappings. When the motion was argued, the prosecution confirmed that it was not seeking to introduce the charge Lewis faced in San Francisco, only that he and Fourth had been jailed together there. The prosecution also was not interested in eliciting that Lewis was arrested and charged with having false identification, only that he possessed the identification found by the police.

Defense counsel argued at the hearing on the motion that Lewis's incarceration with Fourth had little probative value because it was remote in time to the crimes, and would be cumulative of other evidence of their association. The prosecutor responded that the "timeline is of paramount importance in this case," and there would be relatively little evidence of Lewis's association with the Bakery before the crimes occurred. The prosecutor stated that the evidence "establish[ing] a relationship prior to the commission of the crime is very limited, very limited. The bulk of it postdates the crime." The defense argued that the incarceration evidence was irrelevant because "simply trying to tie Mr. Lewis to Yusuf Bey, IV is an attempt to ping him with guilt by association."

The defense argued that the false driver's license had little probative value because it would not show that Lewis was in the Chrysler on the night of the crimes, and the prosecution's theory was that he rode in the Crown Victoria, not the Chrysler. The prosecution argued that Lewis exhibited consciousness of guilt when he denied having identification, and that the circumstances "immediately prior" to seizure of the license should be admitted to show that the seizure was not "arbitrary and capricious."

The court denied the motion in limine, finding that the probative value of the evidence was not substantially outweighed by any prejudicial effect. The court ruled that the prosecution could introduce evidence of the incarceration, but not the underlying charge. The prosecution could introduce the fact that Lewis possessed the identification the police recovered and the circumstances of its seizure, but not the facts that the license was fraudulent and led to charges.

Lewis then renewed his motion to exclude the license on the ground that its seizure was the product of an unlawful detention. At the suppression hearing, Officer Gysin testified to the events on the day the license was seized, and about his prior encounters with the Bakery, including the resisting arrest incident involving Fourth, the incident with the woman being held captive at the Bakery, and the time when Fourth laughed while gunshots were being fired at the Bakery. He testified about the officer safety policy of avoiding unnecessary confrontations with the Bakery. He said that he arrested Lewis for being the person on the wanted flyer, and found the identification in a search incident to the arrest. The court again denied the motion to exclude the identification.

(2) Habeas Petition

Lewis's petition for habeas corpus is supported by the declaration of his trial counsel discussing the in limine motion to exclude evidence of his incarceration and false driver's license. Counsel notes that he objected under section 352 to introduction of Lewis's incarceration with Fourth on the grounds that the evidence was an improper attempt to incriminate Lewis with "guilt by association," and cumulative of other evidence connecting Lewis to Fourth. Counsel observes that the prosecutor responded to his argument that the evidence would be cumulative by stating that the bulk of the evidence connecting Lewis to the Bakery postdated the crimes.

Counsel declares: "I interpreted the prosecutor's statement to mean that the government was not planning on admitting a lot of evidence about the Bakery prior to Mr. Lewis's arrival there, which was only, at most, 15 days before the commission of the offenses. [¶] . . . The record on appeal reflects that at the end of the foregoing colloquy [when the prosecutor said that relatively little evidence connected Lewis to the Bakery prior to the crimes], the court did not rule on my objection under Evidence Code section 352, and I did not seek a ruling from the court on my objection. However, at the time I believed I had obtained a ruling from the court, and I certainly intended to obtain a ruling from the court. I believed at the time that I had preserved the record on appeal. To the extent the record on appeal reflects that I did not preserve the issue for appellate review, I



had no tactical reason for not doing so. It was my intention to make the objection, to obtain a ruling on it, and to preserve the issue for appellate review. [¶] . . . [¶] I did not object to the prosecutor’s reference to third-party other-crimes evidence in opening statement or closing argument, because I believed I had adequately preserved the record on appeal by my earlier objection at the hearing on the motions in limine. To the extent the record on appeal reflects that I did not preserve these issue for appellate review, I had no tactical reason for not objecting.”

### (3) Legal Standards

“The law governing [an ineffective assistance of counsel] claim is settled. ‘A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. [Citations.] “Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance.’ ” [Citations.] It is [a] defendant’s burden to demonstrate the inadequacy of trial counsel. [Citation.] . . . ‘ “In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel’s performance was ‘deficient’ because his ‘representation fell below an objective standard of reasonableness . . . under prevailing professional norms.’ [Citations.] Second, he must also show prejudice flowing from counsel’s performance or lack thereof. [Citation.] Prejudice is shown when there is a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ ” ’ [Citation.]” (*People v. Lucas* (1995) 12 Cal.4th 415, 436.)

“Reviewing courts defer to counsel’s reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a ‘strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’ [Citation.]” (*People v. Lucas, supra*, 12 Cal.4th at pp. 436-437.) “The decision whether to object to the admission of evidence is ‘inherently tactical,’ and a failure to object will rarely reflect deficient performance by counsel.” (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1335.)

(4) Analysis

(a) Counsel Did Not Object to the Evidence

Consistent with trial counsel's declaration in the habeas petition, Lewis identifies counsel's dereliction as failing to obtain a ruling on an objection to admission of evidence of crimes committed by other Bakery members. But the record reveals no such objection. Third-party other crimes evidence was not challenged in the in limine motion Lewis filed, or at the hearing on the motion at which the objection was allegedly made. The motion only concerned evidence suggesting criminality on the part of *Lewis*—that he had been incarcerated in San Francisco, and arrested in Oakland for possessing false identification. Lewis contends the prosecutor's comment that most of the evidence of Lewis's connection with the Bakery postdated the crimes "can reasonably be interpreted as the government's representation that it did not intend to admit a lot of evidence concerning the Bakery prior to Lewis's arrival there." However, the prosecutor was talking about Lewis's relationship with the Bakery, not the Bakery in general. Thus, contrary to counsel's declaration, there was no objection to introduction of the other crimes evidence, and the admissibility of that evidence was never challenged.<sup>5</sup>

(b) Counsel Had No Tactical Reason for Not Objecting

Counsel's mistaken assertion that he objected to the evidence obviously does nothing to weaken Lewis's claim of incompetence. The People argue that we must discount counsel's declaration that he did not intend to forfeit an objection and had no tactical purpose in doing so because "[s]elf-proclaimed inadequacies on the part of trial counsel in aid of a client on appeal are not persuasive." (*People v. Beagle* (1972) 6 Cal.3d 441, 457.) But we need not rely on counsel's declaration for any purpose because

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<sup>5</sup> Both sides advance arguments as if this were not true. The People contend that the court did not abuse its discretion in admitting the evidence, but the court was never called upon to rule on its admissibility. Lewis contends that the People forfeited the argument, discussed below, that the other crimes evidence was relevant to rehabilitate witnesses' credibility because the prosecution "never sought to admit the evidence under that theory at trial." However, since the evidence was unchallenged, the prosecution did not articulate any theory of admissibility.

this is an unusual case where the lack of a tactical reason for failing to object to the admission of evidence is apparent from the appellate record. Counsel urged the jury to disregard the third-party other crimes evidence, and told the jury that Lewis could not properly be convicted on the basis of that evidence—arguments Lewis contends should have been made to the court. It is clear from those jury arguments that counsel believed the evidence was irrelevant and prejudicial, and thus inadmissible under section 352.

(c) The Evidence Was Excludable Under Section 352

The next question is whether section 352 objections to the other crimes evidence would likely have been sustained. If not, the failure to object was not deficient performance and Lewis was not prejudiced by the failure. (See *People v. Memro* (1995) 11 Cal.4th 786, 834 [futile motions are unnecessary], overruled on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) A trial court exercises broad discretion in deciding whether the probative value of evidence is “substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . .” (§ 352; *People v. Linton* (2013) 56 Cal.4th 1146, 1181.) But despite the breadth of that discretion, there can be little doubt that most, if not all, of the other crimes evidence would have been excluded had section 352 objections been made.

“Evidence has probative value if it ‘ha[s] a “tendency in reason to prove or disprove any disputed fact.” ’ ” (*People v. Rivera* (2011) 201 Cal.App.4th 353, 362.) Evidence is prejudicial for purposes of section 352 if it “ ‘tends to evoke an emotional bias against the defendant’ ” (*People v. Valdez* (2012) 55 Cal.4th 82, 133), and “ ‘encourages the jury to prejudge defendant’s case based upon extraneous or irrelevant considerations’ ” (*People v. Cowan* (2010) 50 Cal.4th 401, 479; see also *People v. Scott* (2011) 52 Cal.4th 452, 491[“ ‘ “evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information . . . to reward or punish one side” ’ ”].) Evidence is substantially more prejudicial than probative “ ‘if, broadly stated, it poses an intolerable “risk to the fairness of the proceedings or the reliability of the outcome.” ’ ” (*People v. Tran* (2011) 51 Cal.4th 1040, 1047.)

A small portion of the third-party other crimes evidence presented in the case might have survived a challenge under these standards. The defense might have been helped by Raheem's testimony that, in exchange for his testimony against Lewis, he expected to avoid serving any part of a potential 30-year sentence for vandalism, hate crimes, and criminal threats. While the nature of the crimes was essentially irrelevant, the jury learned that Bakery members had vandalized a liquor store to protest the sale of alcohol to the African-American community. The vandalism might not have prejudiced the jury against Lewis because it occurred two years before he joined the Bakery, and ostensibly had some altruistic purpose. The jury heard that, before the Bakery was raided, Fifth went to jail for possessing an assault handgun, and that he had been arrested for the offense while Fourth was shoplifting. Those crimes were, again, essentially irrelevant but not especially inflammatory given all the other evidence of guns at the Bakery, and the relatively innocuous nature of the shoplifting offense.

However, the rest of the other crimes evidence had no, or negligible, probative value and was likely very inflammatory. Officer Gysin's testimony about his encounters with the Bakery before Lewis arrived there showed that other Bakery members had been sufficiently threatening to prevent police from arresting Fourth and coming to the assistance of someone falsely imprisoned there by Bakery members. Gysin's detailed descriptions of menacing behavior at the Bakery merely served to paint other Bakery members in an unfavorable light. They were entirely irrelevant to issue of Lewis's guilt.

The People maintain that "[s]uch evidence was relevant to show the nature of Your Black Muslim Bakery in order to explain police conduct. . . . The violent nature of Your Black Muslim Bakery was relevant to explain the manner in which police officers executed the search warrants of Your Black Muslim Bakery; with several SWAT teams, heavily armed, using a metal 'ram' to knock in the front door, and by an unannounced forceful entry." However, this appellate argument is symptomatic of the problem Lewis has identified with the prosecution and defense of his case. Evidence of the manner in which police executed the raid on the Bakery was itself irrelevant and inflammatory, and

potentially excludable under section 352.<sup>6</sup> The only need to “explain police conduct” in this case arose in the suppression hearing due to Lewis’s Fourth Amendment objection to Gysin’s seizure of his identification. Gysin’s prior encounters with the Bakery perhaps factored into whether he had probable cause to arrest Lewis. But just because those encounters may have been relevant at the hearing on the motion to exclude the identification did not mean they were also relevant at trial.

The People argue that evidence that the Bakery was a “hierarchical paramilitary organization controlled by [Fourth] was relevant to show that [Lewis], as member of the Bakery and as a soldier of the military wing of the organization, was committed and motivated to carry out orders by [Fourth]. . . . [T]he evidence shows that in return for [Lewis’s] loyalty, [Fourth] promoted [Lewis] to a position of authority and importance within the organization. Hence, the nature of the Bakery was relevant to show [Lewis’s] motive for committing the crimes in this case.” However, elaborations on Gysin’s encounters with Bakery members other than Lewis were unnecessary to prove that the Bakery was a paramilitary organization headed by Fourth because those facts were well established by other evidence. Raheem, for example, testified that the Bakery “was just like a military setup” with “soldiers” who responded to “fruit calls” to protect the Bakery’s interests, that Fourth put out more fruit calls than the former leader, and that members had “a lot” of standoffs with the police precipitated by barking dogs. To the extent that detailed accounts of Gysin’s run-ins with other Bakery members were offered for the purpose the People posit, they were cumulative of other evidence and their limited probative value was far outweighed by their potentially prejudicial effect.

Nor do we find any persuasive justification for introduction of the evidence that Fifth and others shot up Cook’s car, that Broussard had murdered Bailey on Fourth’s orders, or that Fourth and Mackey had been indicted for three murders. None of this criminality by other Bakery members tended in reason to link Lewis with the charged

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<sup>6</sup> The same observations apply to Officer Snyder’s testimony that he needed “lethal cover” when he went to investigate the handcuffed woman because the Bakery was heavily armed and run like “organized crime.”

offenses. The potential for prejudice was manifest. Bailey's notorious murder, in particular, may have been highly inflammatory.

In limited situations, guilt requires proof of association with others who commit crimes. (See Pen. Code, § 186.22, subd. (a) [enhancement for active participation in criminal street gang]; CALCRIM No. 1400 [elements include knowledge that members of the gang have engaged in a pattern of criminal gang activity].) In general, however, care must be taken to avoid convicting a defendant through guilt by association. (See *People v. Lopez* (2008) 42 Cal.4th 960, 967; *People v. Memory* (2010) 182 Cal.App.4th 835, 859; *People v. Neely* (2009) 176 Cal.App.4th 787, 795; *People v. Jackson* (1967) 254 Cal.App.2d 655, 660; *People v. Chambers* (1964) 231 Cal.App.2d 23, 28-29.) The other crimes evidence created the risk of such a conviction here.

The People contend that evidence of the shooting of Cook's car and the murders of Bailey and others were relevant to rehabilitate the credibility of Raheem, Joshua, and Fifth. We disagree. They were of no, or negligible, such relevance.

The People argue that evidence Fourth ordered the shooting of Cook's car and the Bailey murder "was relevant to show that Raheem lied to police and the prosecutor, because he feared that if he did not do as [Fourth] instructed, there would be repercussions for him and his family. Although Raheem testified that he was not intimidated by [Fourth], the jury could reasonably conclude otherwise." However, Raheem lied to the police and told them the Chrysler was stolen before Bailey was murdered. After the Bailey murder, when Raheem was interviewed by the police following his arrest in connection with this case, he was truthful about the events of May 17. The Bailey murder could have had nothing to do with Raheem's lies to the police. Neither did the shooting of Cook's car, because Raheem testified that he did not learn, until after the Bakery was raided, that Fourth had ordered the shooting.

As for lies to the prosecutor, Raheem testified that he conveyed information to the district attorney that "weasel[ed] around" his post-arrest statement. He did so because he believed that Fourth was possibly being framed for the kidnappings. When he later told Fourth that he had decided to tell the truth, Fourth threatened him by saying something

like “Elijah’s going to chastise you.” Despite the threat, Raheem says he never feared Fourth. The People theorize that Raheem lied for a time to the prosecution because he feared Fourth, and that he feared Fourth because of what he learned about Fourth’s involvement in the shooting and murder. But it is highly unlikely that the inflammatory evidence of the shooting and murder would have been admitted over a section 352 objection to support those tenuous inferences. And those inferences would not have “rehabilitated” Raheem because they contradicted his testimony that he lied to help Fourth and did not fear him.

With respect to Joshua, the People observe that there were multiple grounds to challenge his credibility, and they argue that: “To rehabilitate Joshua’s credibility, the prosecutor elicited testimony from Joshua that prior to trial, the prosecutor discussed with him the importance of telling the truth, and about what he knew about Chauncey Bailey’s murder, a couple of other murders, and the shooting up of [Cook’s] car. . . . Joshua being forthcoming about other criminal acts by Bakery members was relevant to show that Joshua also was telling the truth about what he knew of the May 17 kidnapping and torture of [Doe One].” However, Joshua’s testimony about the other crimes suggested that he had *not* been entirely forthcoming about them. As we have previously quoted: “Q. Have I asked you questions about the Chauncey Bailey murder? A. Yes. Q. About a couple of other murders as well? A. Yes. Q. About shooting up [Cook’s] car? A. Yes. Q. Have there been times, Joshua, when I’ve told you that I didn’t think you were being completely honest with me? A. Yes.” This exchange does more to impugn Joshua’s credibility than rehabilitate it.

The People argue that Bailey’s murder was relevant to explain the circumstances of Joshua’s arrest. Joshua testified that he had left the Bakery by the time it was raided, but that he was arrested there on the morning of the raid. He went to the Bakery that morning when he heard about the raid because he wanted to make sure that a sister and other people there were alright. The prosecutor asked him whether he was surprised by the raid, and he said, “Yes.” The prosecutor then elicited that he had learned about Bailey’s killing the day before, and about the Bakery’s suspected involvement. This

appears to be another gratuitous reference to that infamous crime. How Joshua came to be arrested, and when he learned about the Bailey murder, were irrelevant to Lewis's guilt.

As for Fifth, the People offer no clear rationale for the questions he was asked about his participation in the shooting of Cook's car. The prosecutor argued to the jury that Fifth's reluctance to answer questions about the incident showed that he was testifying truthfully about Lewis, but we do not see the connection.<sup>7</sup> Fifth could not have been "rehabilitated" by evidence that he and other Bakery members showered a car with bullets without bothering to check whether it was occupied.

The People identify no probative value for the third-party other crimes evidence that was not substantially outweighed by its prejudicial effect.

(d) The Evidence Was Prejudicial

A defendant must be proven personally guilty of a crime, and guilt by association is impermissible. (*People v. Chambers, supra*, 231 Cal.App.2d at pp. 28-29.) With these fundamental tenets in mind, we consider whether Lewis was prejudiced by the admission of the third-party other crimes evidence. In many ways, Lewis's case is the same as others where defendants have been prejudiced by evidence of crimes committed by other members of gangs with whom they are associated. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 227-232; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 343-345; *People v. Maestas* (1993) 20 Cal.App.4th 1482, 1500-1501; *In re Wing Y.* (1977) 67 Cal.App.3d 69, 79 (*Wing Y.*)). "Erroneous admission of gang-related evidence, particularly regarding criminal activities, has frequently been found to be reversible error,

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<sup>7</sup> The subject of the shooting incident was first broached in connection with Fifth's plea agreement. The prosecutor asked Fifth whether the incident was discussed when the plea was negotiated, and Fifth said, "Yes." The prosecutor then asked, "What was your understanding as to why we were discussing that incident?" Fifth answered, "I don't know." When the prosecutor returned to the subject later in the direct examination, Fifth was reluctant to discuss it. "Q. Is this something that's uncomfortable for you to talk about? A. Yes. Q. Why is that? A. Because I don't understand the relevance . . . ." Neither do we.



because of its inflammatory nature and tendency to imply criminal disposition, or actual culpability.” (*People v. Bojorquez, supra*, 104 Cal.App.4th at p. 345.)

In *Wing Y.*, for example, a minor was alleged to have robbed a liquor store, but the victim could not identify him. Two defense witnesses provided an alibi. Cross-examination revealed that the defense witnesses and the minor had been members of the Wah Ching gang. One of the witnesses denied any “[ab]normal” behavior while he was in the gang. (*Wing Y., supra*, 67 Cal.App.3d at p. 74.) In rebuttal, a police officer testified that the minor was an active gang member, and that gang members were “involved in many extortions, robberies, burglary from motor vehicles, theft from motor vehicles in Chinatown.” (*Id.* at p. 75.) The order of wardship was reversed due to the erroneous admission of this “catastrophically prejudicial” rebuttal testimony. (*Id.* at p. 76.)

The court reasoned that “neither the described criminal activities of Wah Ching nor the asserted active membership in the group by the minor Wing, as testified to by Officer Lou, had any ‘tendency in reason’ to prove a disputed fact, i.e., the identity of the person who committed the charged offense. Membership in an organization does not lead reasonably to any inference as to the conduct of a member on a given occasion. Hence, the evidence was not relevant. It allowed, on the contrary, *unreasonable* inferences to be made by the trier of fact that the minor Wing was guilty of the offense charged on the theory of ‘guilt by association.’ ” (*Wing Y., supra*, 67 Cal.App.3d at p. 79.) The same reasoning applies equally here.

For a number of reasons, we are compelled to conclude that Lewis was prejudiced by admission of the third-party other crimes evidence. A good deal of such evidence was admitted. As we have said, the jury learned that other Bakery members committed shoplifting, resisting arrest, vandalism, hate crimes, criminal threats, false imprisonment, illegal firearm possession and use, and murder.

The prosecution fanned the inflammatory aspects of this evidence in arguments to the jury. In his opening statement, the prosecutor told the jury that it would hear Gysin testify to his unfriendly encounters with Bakery members, and the concerns about officer

safety in dealing with the Bakery. He likened the raid on the Bakery to a federal military assault on a “terrorist stronghold,” and tied the event to the murder of Bailey and others. In closing argument, the prosecutor tied Lewis and Broussard, Bailey’s killer, together as “gangsters from San Francisco.” He linked Lewis to Broussard’s committing murder by saying that July 29, the day Lewis posed as security for Fourth, was an “important day” because “Chauncey Bailey got blown away” four days later. “Chauncey Bailey gets killed,” he said, when “[y]ou get guys like Lewis on the scene.” Further prejudice resulted from the prosecutor’s erroneous argument that Joshua’s and Fifth’s testimony could be corroborated by the fact that Bakery members perpetrated crimes.

Defense counsel exhorted the jury not to convict Lewis based on guilt by association, but neither sought nor received a jury instruction that limited the issues for which other crimes evidence could be considered. (Compare, *People v. Williams* (2009) 170 Cal.App.4th 587, 609, 613 [cumulative evidence, including at least eight crimes committed by gang members, was erroneously admitted in prosecution for gang-related charges; the error was harmless because, among other things, the jury was instructed that the evidence could not be considered as proof that the defendant had a bad character or criminal disposition].)

The evidence for Lewis’s guilt was far from overwhelming. He was convicted mainly on the basis of thinly corroborated testimony of accomplices who received substantial benefits for their testimony. Perhaps the strongest such evidence was Joshua’s initial statement after being arrested, when he implicated Lewis and Fifth, along with himself and the others in the crimes. It is not apparent why Joshua would have been lying about Lewis when he incriminated himself and inculpated Fifth, with whom he was reputedly very close. But there were multiple reasons to question the account Joshua ultimately gave of the night of the kidnappings. The two full days of deliberations before the verdicts were reached showed that this was not an open-and-shut case for the jury. There was room for reasonable doubt that Lewis was one of the masked men who perpetrated the crimes.

Under all of these circumstances, the admission of highly prejudicial other crimes evidence having little or no probative value undermines our confidence in the verdict. (*People v. Lucas, supra*, 12 Cal.4th at p. 436.) It is reasonably probable that the outcome would have been different if the evidence had been challenged. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) We cannot hold otherwise.

### **III. DISPOSITION**

The judgment is reversed.<sup>8</sup>

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<sup>8</sup> Since our conclusion is not based on any of the evidence presented in the petition for habeas corpus, the petition is dismissed as moot.

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Siggins, J.

We concur:

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McGuinness, P.J.

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Jenkins, J.